

MEMORANDUM OF LAW

DATE: January 8, 1996

TO: Al Rechany, Senior Contract Specialist,
Metropolitan Wastewater Department

FROM: City Attorney

SUBJECT: "Unilateral" Change Orders -- Disputed Work

By request dated December 1, 1995 you asked for legal perspective on a November 27, 1995 memorandum from the Program Construction Manager, Sverdrup-Kaiser Engineers ("SKE"), concerning the issue of "unilateral" change orders. The SKE memo identifies San Diego Municipal Code section 22.0209(d) as a matter of concern in instances where contractors will not agree with the Construction Manager over all terms for changes in the work. (San Diego Municipal Code section 22.0209(d) requires that alterations to contracts approved by the City Manager must be in writing between the contractor and City Manager.) SKE suggests that there are two special situations where lack of complete written agreement for changed work may not be contrary to the requirement that amendments be reduced to written agreement. These are: 1) the "Credit Change Order," where a deletion of contract work results in a cost credit being due to the owner, but the contractor will not agree to the value of the credit; and 2) the "No Contract Time Extension Change Order," where the contractor agrees to a cost value for extra work, but disagrees with the Construction Manager's determination that no contract time extension is correspondingly due. SKE seeks direction from the City as to whether these "special situation" change orders may be issued within the parameters of the ordinance, since these situations would not involve direct cost increases to the contract.

These questions regarding application of the change order ordinance are more properly deferred to the disputed work provisions of the contract, not only with respect to the limited situations mentioned, but in all cases where there is disagreement over terms for changes in the work.

In analyzing the cited circumstances or for that matter any circumstances involving partial disagreement over changed work, provisions in the underlying contract control in conjunction with the change order ordinance. The contracts originally approved by the City Council contain provisions for "disputed work" which exist for the very

purpose of being applied in the event of disagreement over changes in the work during contract performance. For example, see Standard Specifications for Public Works Construction ("Green Book"), section 3-5, which provides:

If the contractor and Agency are unable to reach agreement on disputed work, the Agency may direct the contractor to proceed with the work. Payment shall be as later determined by arbitration if the Agency and contractor agree thereto, or as fixed by a court of law.

The substance of the disputed work provisions thus allows the owner what is commensurate to "unilateral" change order authority although, of course, that authority cannot require the contractor to waive claims to what he believes his entitlement to be.

This illustrates a definitional problem with the concept of a "unilateral" change order which, in a sense, is a misnomer. A change order is a modification to the contract concerning the terms under which changes in the work will be performed, and like the contract itself, a modification to the contract requires the full assent of both parties. Modification is a change in the obligation by a modifying agreement, which requires mutual assent. *Harvey v. DeGarmo*, 129 Cal. App. 487 (1933). The variation of a contract is as much a matter of contract as the original agreement. *Id.* at 492, 493. Thus, where mutual assent is lacking with respect to any term upon which changed work is to be performed, no amendment to the contract exists, nor can one be imposed unilaterally on the contractor. What exists instead in such a case is a dispute with respect to only those terms over which there is disagreement. As for those terms upon which there is disagreement, no written amendment to the contract is necessary to require the contractor to perform the changes in the work as directed, because this obligation exists by virtue of the disputed work provisions of the underlying contract.

The terms under which changed work is performed need not be an "all or none" proposition. Clearly, it is far preferable that all changes to the work be performed pursuant to a written change order with comprehensive agreement on all material terms. But it is not an ideal world, and occasions will arise where agreement can be reached only on some but not all material terms. These partial disagreements should not frustrate or prevent disposition of the undisputed issues by way of written change order. Only those terms upon which there is disagreement should fall into the "disputes" category. As for those issues, the contractor is fully responsible for complying with the disputed work provisions which, in addition to the language cited for example above, require the contractor to perform the work without excuse for delay on mere account of the disputed terms, and require the prompt notice of

claimed impacts and the furnishing of full documentation to support those claims.

In summary, when changes in the work become necessary, the Construction Manager has lawful agency and authority to direct their performance, regardless of the contractor's complete agreement to all terms; provided, however, that those terms upon which there is agreement must be reduced to a change order approved within the confines of San Diego Municipal Code section 22.0209. The Construction Manager should endeavor to obtain agreement on as many terms as possible via change order approved by the City Manager or City Council, depending on considerations of cost and prior appropriations. In regard to disputed terms for changed work, the Construction Manager should hold the contractor accountable under the disputed work provisions. Disputed issues should be reasonably minimized, monitored, and regularly discussed with a goal for resolution at the earliest possible juncture.

Hopefully this will suffice as a reply to your inquiry.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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cc Roger Woodhull, SKE

Bill Hanley, MWWD

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